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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

SIMON & SCHUSTER, INC.,

Petitioner

v.

THE NEW YORK STATE

CRIME VICTIMS BOARD,

Respondent

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

BRIEF, AMICUS CURIAE

IN SUPPORT OF RESPONDENT:

THE CRIME VICTIMS LEGAL CLINIC

Judith Rowland
Attorney at Law
Crime Victims Legal Clinic
1221 22nd Street
San Diego, CA 92102
(619) 232 3300

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT ESTABLISH AN ADDITIONAL CLASSIFICATION OF SPEECH, UNPROTECTED BY THE FIRST AMENDMENT, TO PREVENT PERNICIOUS PROFITEERING, WHICH OCCURS WHEN CRIMINALS SEEK TO PROFIT FROM THE COMMERCIAL EXPLOITATION OF THEIR CRIMES?

II. DO THE BENEFITS RECEIVED BY VICTIMS UNDER ENFORCEMENT OF "SON-OF-SAM" STATUTES SUBSTANTIALLY OUTWEIGH ANY BURDENS ON FREE EXPRESSION EXPERIENCED BY CRIMINALS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

IDENTITY AND INTEREST OF AMICUS CURIAE....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....

I. THE COURT SHOULD ESTABLISH AN ADDITIONAL CLASSIFICATION OF SPEECH, UNPROTECTED BY THE FIRST AMENDMENT, TO PREVENT PERNICIOUS PROFITEERING, WHICH OCCURS WHEN CRIMINALS SEEK TO PROFIT FROM THE COMMERCIAL EXPLOITATION OF THEIR CRIMES.....6

II. THE BENEFITS RECEIVED BY VICTIMS UNDER ENFORCEMENT OF "SON OF SAM" STATUTES SUBSTANTIALLY OUTWEIGH ANY BURDEN ON FREE EXPORESSION EXPERIENCED BY CRIMINALS.....21

CONCLUSION.....34

TABLE OF AUTHORITIES

CASES Page

Abrams v. U.S.,
250 U.S. 616 (1919).....6

Beauharnais v. Illinois,
343 U.S. 250 (1952).....14

Brandenberg v. Ohio,
395 U.S. 444 (1969).....12

Branzburg v. Hayes,
408 U.S. 665 (1972).....24

Briscoe v. Readers Digest Asso.,
4 Ca.3d 529 (1971).....29

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942).....8,9,12,14

Dennis v. United States,
341 U.S. 494 (1951).....24

Erzonznik v. Jacksonville,
422 U.S. 205 (1975).....32

Florida Star v. B.J.F.,
491 U.S. 524 (1989).....11,16

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).....15

Giboney v. Empire Storage & Ice Co.,
336 U.S. 490 (1949).....18

In the Matter of Application of Children of Bedford, Inc.,
541 N.Y.S.2d 894 (Sup.Ct. 1989).....28

Linmark Associates, Inc., v. Township of Willingboro,
431 U.S. 85 (1977).....7

Meyer v. Grant,
486 U.S. 414 (1988).....26

Miller v. California,
413 U.S. 15 (1973).....17

Miranda v. Arizona,
384 U.S. 436 (1966).....21,22

New York v. Ferber,
458 U.S. 747 (1982).....8,17,18,20,34

New York Times v. Sullivan,
376 U.S. 254 (1964).....14

Riggs v. Palmer,
22 N.E. 188 (1889).....23,24

Roth v. United States,
354 U.S. 476 (1957).....8

Schenck v. U.S.,
249 U.S. 47 (1919).....6,24

Simon and Schuster v. Members of the New York State Crime Victims Board,
724 F.Supp. 170 (1989).....19,20

United States v. Hastings,
461 U.S. 499 (1983).....10

Whitney v. California,
274 U.S. 357 (1927).....7

PERIODICALS

Page

Bloustein, Privacy, Tort Law, and the Constitution: Is Warren Brandeis' Tort Petty and Unconstitutional?, 46 Tex. L. Rev. 611 (1968).....31

Hudson, The Crime Victim and the Criminal Justice System: Time For A Change, 11 Pepperdine L. Rev. 55 (1984).....27

Kilpatrick & Otto, Constitutionality Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning, 34 Wayne L. Rev. 7 (1987).....32,33

Okuda, Criminal AntiProfit Laws: Some Thoughts In Favor of Their Constitutionality, 76 Calif. L. Rev. 1353 (1988).....26

TEXTS

Page

Bard, M. and Sangrey, D., The Crime Victims Book, (1986).....32

Diagnostic and Statistical Manual III - Revised, American Psychiatric Association (1987).....11,19

Eth & Pynoos, Developmental Perspectives on Psychic Trauma in Childhood, essay in Post Traumatic Therapy and Victims of Violence, 46 (F.M. Ochberg Ed. (1988)).....10,18

Tribe, L.,American Constitutional Law, (Foundation Press, 2d ed. 1988).....7

STATUTES

Page

New York Executive Law, § 632-a (McKinney 1982 & Supp. 1990).....20,21,25

MISCELLANEOUS

Declaration of Independence, preamble (U.S. 1776).....22

New York Daily News, "Son of Sam Law Ignored", January, 1986.....31

President's Task Force on Victims of Crime, Final Report, December, 1982; Statement of the Chairman.....30

Texas House Select Committee on Commercial Exploitation.....20

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1. Identity and Interest of Amicus Curiae: THE CRIME VICTIMS LEGAL CLINIC is a project of the California Center on Victimology, a nationally recognized comprehensive crime victim service agency founded in 1985 and based in San Diego, California. Among the goals of the Clinic and the Center are to protect the rights of crime victims in the criminal justice system, to provide training to the legal and mental health communities who counsel and treat victims of crime, and to reduce the trauma suffered by crime victims, their families, and the community in which they live.

2. Desirability of a Brief Amicus Curiae: The instant case is one which the interests of victims of crime are directly involved. Amicus represents the only law firm (legal clinic) in the country whose only clients are crime victims, and is

concerned with constitutional issues arising in both civil and criminal law.

3. Reasons For Believing that Existing Briefs May Not Present All Issues, and Avoidance of Duplication: In this brief, Amicus will discuss national policy-related and legal issues relating to the impact of this Court's decision in the instant case and in particular to the crime victim as the primary client. Counsel for Amicus has consulted with Counsel for Respondent in an effort to avoid unnecessary duplication and believe that its policy and legal arguments will present issues that are not otherwise raised.

4. Consent of the Parties: Counsel for the Respondent and Counsel for the Petitioner have consented to this filing. Letters to this effect are lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

For many years only two grounds could result in the removal of a class of speech from First Amendment protection. Either the speech was not a part of the free trade of ideas, or, it caused harm which could not be cured by the further exchange of ideas and had little or no social value. In the years since, several more non-accepted classes of speech have been recognized by the Court: "Clear and present danger", "fighting words", "libel" and "obscenity".

More recently, and by applying the same factors which set apart these original classes of unprotected expression the Court created one more category: "child pornography". Today there is a compelling need to regulate yet another type of expression, that of pernicious profiteering, which occurs when criminals attempt to profit from the commercial exploitation of their crimes.

Such expression is currently known collectively as "Son of Sam" statutes.

For the following reasons, the States should be entitled to greater leeway in the regulation of a criminal's speech when the primary motivation is to profit from the commercial exploitation of crime: (1) a criminal's expression about his crimes is harmful to the victim, and should qualify as unprotected by the First Amendment; (2) it is abhorrent for a criminal to profit while his victims suffer financially; (3) promotion of the criminal's story provides an economic motive to commit, and thus is an integral part of, the crime; and, (4) recognizing and classifying the expression of a criminal made solely for the purpose of profit as a category of speech outside the First Amendment's protection, is compatible with this Court's prior decisions concerning unprotected speech.

The Court should, therefore, create a new classification of speech that is without First Amendment protection and is designed to prevent pernicious profiteering.

In addition to the prevention of pernicious profiteering, Son-of-Sam statutes provide benefits to crime victims which far outweigh the burdens placed upon free expression experienced by criminals.

The purposes of such statutes, and the resulting benefits to victims, can be classified into four distinct categories: (1) to prevent a criminal's unjust enrichment; (2) to decrease the likelihood that society will have to support victims of crime through social service programs; (3) to satisfy the victim's sense of justice and desire for retribution; and (4) to increase the criminal's awareness of the consequences of his crime.

Criminals are not prohibited from the

publication of their stories, but are only denied the right to financial gain therefrom. Any rehabilitative benefit to criminals from publication of their stories should be attainable without the element of greed.

ARGUMENT I

THE COURT SHOULD ESTABLISH AN ADDITIONAL CLASSIFICATION OF SPEECH, UNPROTECTED BY THE FIRST AMENDMENT, TO PREVENT PERNICIOUS PROFITEERING, WHICH OCCURS WHEN CRIMINALS SEEK TO PROFIT FROM THE COMMERCIAL EXPLOITATION OF THEIR CRIMES

In 1919 Justice Holmes illustrated his belief that falsely crying "fire!" in a crowded theatre, is not constitutionally protected speech. (See Schenck v. U.S., 249 U.S. 47 (1919)). Later that year Holmes argued, in his dissent in Abrams v. U.S. 250 U.S. 616 (1919), that "[T]he best test of truth is the power of the thought to get

itself accepted in the competition of the market" and that First Amendment protection does not extend to speech which is not a part of the "free trade of ideas".

Justice Brandeis joined Holmes and expanded the theme eight years later in Whitney v. California, 274 U.S. 357, 377 (1927). He believed speech may be regulated only where "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." Thus, if the speech causes harm which cannot be cured by a "further exchange of ideas", the government may justifiably suppress it. (See L. Tribe, American Constitutional Law, 833-834 n.4 (Foundation Press, 2nd Ed. 1988)).

This recurrent theme was also relied upon in Justice Thurgood Marshall's opinion for a unanimous Court in 1977, in Linmark Associates, Inc., v. Township of Willing-

boro, 431 U.S. 85 (1977); also see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942); Roth v. United States, 354 U.S. 476, 503 (1957); New York v. Ferber, 458 U.S. 747, at 754 (1982)(citing Chaplinsky)

> The Court has traditionally recognized,
>
> "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem."

Words labeled,

> "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words....", illustrate speech causing harm that is incurable by the further exchange of ideas, and of "slight social value as a step for truth." (See Chaplinsky, at 571-572.)

Unprotected categories of speech all carry characteristics that result in reduced, or no, First Amendment protection. First, they are not an essential part of any exposition of ideas. There is no debate, dialogue or attempt to seek a reply nor to persuade or be persuaded in one's beliefs.

Second, when uttered, such expression either inflicts harm or injury (with or without the opportunity to respond) or is likely to incite action to an imminent breach of the peace or other lawless act. (See Chaplinsky, at 571-572).

When the criminal commercially exploits his life of crime, for pernicious profiteering through the media, (while his victims bear the expense and pain his crime has injected into their shattered lives) there is no attempt at debate or dialogue, nor is a reply sought. There is merely the attempt to further capitalize on and exploit the criminal act for profit.[1]

Injury caused to the victim by the mere utterance (let alone the full scale Madison-

[1] This is not to say that the criminal couldn't have motivations other than profiting from his crime, it is just to say that the expression only has First Amendment protection in the context of dialogue and not in the context of exploitation for profit.

Avenue-promotion) of the details of a crime, have been well documented. For example, studies show that school-aged children can undergo intense physical symptoms as a result of being victimized by crime in which the "sight sound and the smell of gunfire, the screams or sudden silence of the victims, the splash of blood on the child's clothes, the gasp of a dying parent..." are reexperienced. There may also be an autonomic arousal such as "My heart hurt; it was beating so loud." (See, Eth & Pynoos, Developmental Perspective on Psychic Trauma in Childhood, essay in Post-Traumatic Therapy and Victims of Violence 46 (F.M. Ochberg Ed. 1988)). In United States v. Hastings, 461 U.S. 499 (1983), this Court chastised the Court of Appeal for not considering the traumatic effect a retrial would have on the victims. The Court has also acknowledged the need to protect a

victim's peace-of-mind resulting from the pain and injury victims experience from the trial and it's ancillary publicity. (See, Justice White's dissent in Florida Star v. B.J.F., 491 U.S. 524, 552 (1989)).[2]

Very often a permanent record of the victimization is exacerbated by the circulation and promotion of a publication which can remind the victim of the traumatic event, triggering behavioral changes, fantasies and nightmares. (See, Diagnostic and Statistical Manual-III-Revised 250 § 309.89 American Psychiatric Association (1987)).

By comparing the category of pernicious profiteering to other unprotected categories of speech, a common thread is found.

Before concluding that the content of

[2] It should be noted that the Court steadfastly refused to hold either that truthful publication can never be punished, or, that publication of a rape victim's name is unprotected by the First Amendment.

speech is outside the protection of the First Amendment, the Court has always analyzed the speech by weighing the harm caused by the speech (content) against society's interest in encouraging the free flow of ideas.

Chaplinsky originated the "Fighting Words" doctrine, allowing regulation of words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace (Id. at 572)

In Brandenberg v. Ohio, 395 U.S. 444, at 447 (1969), the Court articulated that speech advocating the use of force or crime could only be proscribed if the advocacy is "directed to inciting or producing imminent lawless action" and is "likely to incite or produce such action."

It takes little imagination to envision a fight ensuing if a criminal reads the details of his crime to family members of

his victim (from his book that has made the best seller's list). Although it would be also easy to envision the average reader being annoyed or even offended by the criminal's words depicting his crimes, it is likely that only the victim or the victim's family members could be provoked to the point of retaliation.

Similar potential exists upon an analysis of such expression as advocating lawless action. There are many documented cases of victims or victims' survivors harming those accused of ~~the~~ victimization. The added knowledge gained from reading about the crime and knowing the criminal has been well

paid can reasonably be expected to further inflame unlawful behavior.

When children see the glamorized version of crimes painted by books and movies such as "Wiseguy", etc., some do react by

quickly perceive that negative behavior can gain wanted attention or notoriety. John Hinkley knew, for example, that by shooting President Reagan he could gain both notoriety and the attention of a movie actress he sought to impress. Hinkley, admitted his behavior was influenced by the movie "Taxi Driver". See Low, Jeffries and Bonnie, The Trial of John W. Hinkley, Jr.: A Case Study in the Insanity Defense 23-27 (1986).

The Chaplinsky Court included libelous statements in its list of categories which are "no essential part of the essential part of ideas" (Id. at 572). In Beauharnais v. Illinois, 343 U.S. 250, at 265 (1952), the Court implied that the state could define libel in any way that "related to the peace and well being of the state", without violating the First Amendment.

New York Times v. Sullivan, 376 U.S. 254, at 279-80 (1964), placed some further

limits on state regulation of defamation actions. Most notable was the requirement of malice or reckless disregard for the truth when statements are made about public officials relating to official conduct.

Crime victims and their families are not public figures by virtue of the fact that they have been victimized. In Gertz v. Robert Welch, Inc., 418 U.S. 323, at 351 (1974), the Court narrowly defined public figures as those who have "general fame and notoriety in the community," or those who have "voluntarily injected themselves into a public controversy in order to influence the resolution of the issues involved" (Id.). Gertz also identified a category of involuntary public figure as one who is directly affected by actions of public officials such as the Defendant in a criminal case, due to the public interest in those proceedings (Id. at 347).

While unwilling to categorically determine that publishing the name of a crime victim is unprotected speech, the Court has implied that publishing facts that invade the victim's privacy or disclose accurate but highly personal facts about victims or their families is not speech absolutely protected by the First Amendment.

> "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim... We hold only that where a newspaper publishes truthful information... lawfully obtained, punishment may lawfully be imposed... only when narrowly tailored to a State interest of the highest order...." (Florida Star v. B.J.F.,491 U.S. 524 (1989).

Once again, the common thread is one linked to the protection of individuals from the injurious words or potential actions of others, and which through careful analysis, has been committed to the elevated category

of compelling state interest.

Miller v. California, 413 U.S. 15 (1973), set forth the three part test for identifying material which may be banned as obscene.

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id, at 24.

When faced with the problem of how to take the obscenity test one step further in order to craft a new class of unprotected speech, child pornography, the Court in New York v. Ferber (458 U.S. 747 (1982)), first acknowledged that:

> "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." Id. at 757.

As the basis of this acknowledgement the Court deferred to legislative judgement and focused on the harmful effect of the exploitation of these children victims by those who seek to make a commercial profit from their illegal activity, noting:

> "[T]he use of the children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child....Because [in part] the child's actions are reduced to a recording, the pornography may haunt him ... long after the original misdeed took place." Id. at 757.

And;

> "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an illegal activity throughout the nation." Id. at 761; Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

The harm caused by the exploitive use of children in the production of pornography is analogous to the harm caused to the victims of violent crime. Eth and Pynoos Id.

> "Recurrent and intrusive recollections of the event; anxiety dreams; psychic numbing with markedly diminished in terest in activities; fear of repeated trauma; and persistent feelings of guilt out of proportion to personal responsibility."[3]

The sponsor of the New York State statute in question in Simon and Schuster v. Members of the New York State Crime Victims Board 724 F. Supp. 170, State Senator Emmanuel R. Gold has stated:

> "It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four calibre killer, can expect to receive large sums of money for his story, once he is captured, while five people are dead, and other people were injured as a result of his conduct... This statute would make it clear that in all criminal situations, the victim must be more important than the criminal." (Id.at 174, citing Memorandum R. Gold, 1977 New York State Legislative Annual, 267)

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[3] Eth and Pynoos are citing the DSM-III-R (1987) diagnosis criteria for Post Traumatic Stress Disorder (PTSD), which they maintain has equal effect on children who have been physically abused as well as those who have been kidnapped, or witnessed a homicide.

Twenty-nine States have modeled and passed legislation similar to 632-a, See 60 ALR 4th 1210 § 2, as recognition of the compelling need to prevent criminals from profiting from the commercial exploitation of their crimes.

Similarly, in Ferber, twenty states had regulated the distribution of child pornography without requiring that the exploitive material be legally obscene. Id. at 749.

Another reason given by the Ferber Court for establishing a new unprotected class of speech was that:

> "Printed materials cannot be isolated or removed from the process involved in developing them." Id. at 762 fn.13 citing Texas House Select Committee on Commercial Exploitation 80.

It appears that the Ferber Court was correct in its application, since Justice Keenan indicates in his opinion in Simon and Schuster, at 176, that Petitioner suggests Mr. Hill, a convicted criminal, whose life of

crime was the basis of the book Wiseguy, would not have cooperated had the Petitioner complied with § 632-a, because he would not have received an immediate profit from his commercial exploitation.

The Court should apply the same factors as in other categories of unprotected speech, creating a new classification, pernicious profiteering, that applies to criminals seeking to commercially exploit their crimes.

ARGUMENT II

THE BENEFITS RECEIVED BY VICTIMS UNDER ENFORCEMENT OF "SON OF SAM" STATUTES SUBSTANTIALLY OUTWEIGH ANY BURDEN ON FREE EXPRESSION EXPERIENCED BY THE CRIMINAL

United States Supreme Court Justice Byron White has stated that the most basic function of any government is to provide protection for its citizens (Miranda v.

Arizona, 384 U.S. 436 (1966)). Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people, and each individual in society has a right to be protected by the Government in the enjoyment of life, liberty, and property (The Declaration of Independence preamble (U.S. 1776). In preventing criminals from being given the opportunity to reap an immediate profit from the depiction and commercialization of their crimes, the States are preserving the liberty and privacy of those victimized.

Victim participation in, and support of, the criminal justice process is essential for the system to operate efficiently. An old idea, newly rediscovered, says that justice cannot be done without taking the victim's interest into account. There is every reason to believe that in a society where government provides rights to tort

recovery and/or no fault social insurance programs for the victims of industrial accidents, natural disasters, unemployment, and hazards of all sorts, that same government can provide for a similar level of financial assistance to victims of crime. It is not unreasonable to expect such a theory to be expanded to provide at least a basic safety net of financial protection for the crime victim.

One such method of expansion has been formed in the so called "Son of Sam" statutes. These statutes are designed to prohibit a criminal from a pernicious profiteering from the sale of his "story" to any interested party, who in turn, sells it to the public. The Son of Sam statutes, derive from the basic premise that "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong...or to acquire property by his own crime." (Riggs

v. Palmer, 115 N.Y. 506, at 511-12, 22 N.E. 188, (1889)) As further expressed in Riggs, these maxims are dictated by public policy, and have their foundation in universal law administered in all civilized countries (Id. at 522).

The primary attack on this theory of unjust enrichment, is that it violates freedom of speech under the First Amendment. However, First Amendment privileges do not guarantee an absolute right to speak or to publish, (Schenck v. United States, 249 U.S. 47 (1919); Branzburg v. Hayes, 408 U.S. 665 (1972)) and the societal value on free speech must, on occasion, be subordinated to other values and considerations (Dennis v. United States, 341 U.S. 494 (1951)).

Although the First Amendment guarantees the freedom of expression, it does not guarantee the right to be paid for that expression. New York's Son of Sam statute,

section 632-a (N.Y. Exec. Law, section 632(a) (McKinney 1982 & Supp. 1990), has served as the model for a majority of the States, which, in itself is indicative of this law's general acceptance by the American public.

In order to determine whether a First Amendment violation has occurred, both the benefits and the burdens to the affected parties must be compared, then measured against the express purposes of the statutes. Finally, the Court must then conclude which interests are more compelling.

The purposes of such statutes can be classified into four distinct categories: (1) to prevent a criminal's unjust enrichment; (2) to decrease the likelihood that society will have to support victims of crime through social programs; (3) to satisfy the victim's sense of justice and desire for retribution; and (4) to increase the

criminal's awareness of the consequences of his crime (See Okuda, Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality, 76 Calif.L.Rev. 1353 (1988)).

Denial of payment for expressive activity could be construed as a direct burden on that activity (Meyer v. Grant, 486 U.S. 414, 108 S.Ct. 1886 (1988)). In some cases, writing or relating the experience of com mitting a crime is a form of rehabilitation for a criminal. There is no doubt that the state has a compelling interest in rehabilitating criminals. If, however, a criminal is writing or speaking to the press as a means of rehabilitation, then the publicity would occur regardless of any monetary incentives.

States have further recognized that it is far better to have criminals writing about their past crimes than engaging in

future ones (USA Today, February 20, 1991). Notorious criminals, presently incarcerated, may be more concerned with future parole considerations than monetary profits. Reputable publishers may actually be more likely to enter into contracts with notorious criminals because the regulation by the state, coupled with the fact that most monies will eventually be paid to the victims, tends to remove the moral stigma and negative publicity that might otherwise result from entering into such contracts. (11 Pepperdine L.Rev. 55 (1984)).

How then, does the curtailment of these benefits to criminals compare to the burdens suffered by those they victimize?

It is a well-established principle that our free speech protections are not absolute, and our legal system has many accepted restrictions, for instance, on those convicted of serious crimes. A convicted felon

gives up many guaranteed rights enjoyed by law abiding citizens: state laws prohibit murderers from profiting from the life insurance policies and testamentary gifts of their victims. Furthermore, although the state has an interest in the rehabilitation of the ex-convict, the state has at least an equally compelling interest in the rehabilitation of innocent victims of violent crime; and by no means should convicted criminals reap the fruits of their crime while their victims remain uncompensated.

The Son of Sam statutes are not an absolute prohibition on the ability of the criminal to profit - the statutes merely divert the profits for a statutory period in order to ensure that victims may be compensated (In the Matter of Application of Children of Bedford, Inc., 541 N.Y.S.2d 894 (Sup.Ct 1989)). The criminal might see a monetary benefit; but only after those

victimized have their chance for just compensation.

The State's compelling interest in protecting the privacy rights of crime victims is equally as important as that of rehabilitating criminals. The primary societal goal is to assist crime victims to return to as productive and normal a life as possible. This "rehabilitation" of crime victims demands that respect be given to their need for privacy. Victims are not victims by choice, nor have they voluntarily thrust themselves into the public eye. A continuing threat of media exposure and disclosure is counterproductive to this process (Briscoe v. Readers Digest Association, 4 Ca.3d 529 (1971)).

The legitimate public right to know should stop short of inflicting harm upon an already traumatized victim. They should be spared the further agony of knowing that

perhaps hundreds of thousands of people are reading the details of their children's deaths-and that the criminal is being paid handsomely to provide this diversion.

Burdens suffered by victims after the actual event begin with the seemingly endless march through the criminal justice process (in fact, this is the single most stressful experience aside from the initial traumatizing event (President's Task Force on Victims of Crime, Final Report, Dec. 1982; Statement of the Chairman)). Arraignment, bail, preliminary hearings, trial, sentencing, and appeals; each forces the victim to relive the victimization. Simultaneously, victims are often reminded continually of their victimization through media exposure.

> "What really is at issue... is not merely the distress the individual suffers as a result of the reawakening of his agony, but the debasement of his sense of self as a person that results because his life has become a public spectacle against his will. There is anguish and mortification, a blow to human dignity, in having the world intrude as an unwanted witness to private tragedy. The wrong is to be found in the fact that a private life has been transformed into a public spectacle." (See, Bloustein, Privacy, Tort Law and the Constitution: Is Warren Brandeis' Tort Petty and Unconstitutional? 46 Tex. L.Rev. 611 (1968)).

Henry Adan, father-in-law of Richard Adan, an aspiring performer who was stabbed to death by paroled killer Jack Henry Abbott in 1981 has been quoted as saying "They throw it in our face...What rights does this murderer have to make money off Richard Adan?" ("Son of Sam Law Ignored", New York Daily News, January 1986).

A statement that invades a person's right to privacy carries with it other significant consequences. Ordinarily,

unwelcome dialogue can be banned if (a) it enters one's home; or if (b) listeners cannot turn their view away from the discourse (Erzonznik v. Jacksonville, 422 U.S. 205 (1975)). Victims of crime are involuntarily subjected to both types of communication. It is virtually impossible for victims to turn their heads away once the momentum of public curiosity about a notorious crime takes on a life of its own, and publishers with visions of dollar signs, insist upon contracting with criminals for their stories.

The emotional responses to violent crime commonly include shock, disbelief, sleeping and eating disturbances, inability to concentrate, and withdrawal from normal human relations. (See generally, M. Bard & D. Sangrey, The Crime Victims Book (1986); Kilpatrick & Otto, Constitutionally Guaranteed Participation in Criminal Proceedings

for Victims: Potential Effects on Psychological Functioning, 34 Wayne L.Rev. 7 (1987)).

By examining the effects of "Son of Sam" statutes to all parties involved in their enforcement, it appears that the interests of the state in compensating victims of violent crime, or at least giving victims an opportunity to be compensated, are more compelling than the interests of the criminal who wishes to write his story.

Any infringement upon First Amendment rights is merely incidental, while the goal the law is serving, that of allowing crime victims an opportunity for compensation - is of vital interest to the State.

Amicus urges the Court to find that the burdens forced upon victims of crime by pernicious profiteering substantially outweigh any benefits received by convicted criminals.

CONCLUSION

The court should apply the same factors as in other categories of unprotected speech, creating a new classification, pernicious profiteering, that applies to criminals seeking to commercially exploit their criminal stories.

To support the unanimous opinion of the Court in Ferber Justice White wrote:

> "Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.... When a definable class of material ... bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment." Id. at 763-764.

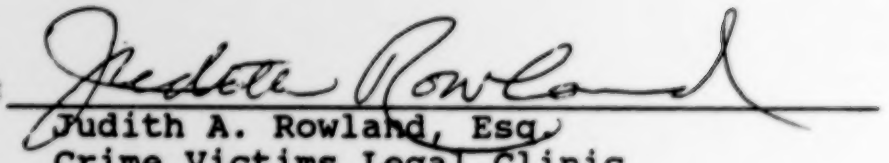
Amicus urges the Court to apply this standard to the present case, recognizing the common thread, be it exploitation of chil-

dren by the sale of pornography or the exploitation of children by making a movie of how their mother was raped and stabbed to death in the child's presence.

Amicus further urges the Court to create a new class of speech, pernicious profiteering, which is without First Amendment protection, and applies to the expression by criminals made for the purpose of commercially exploiting their crimes.

Amicus also respectfully requests the Court to conclude that the benefits to victims, represented by Son of Sam Statutes, when compared to the burdens imposed upon criminals, far outweigh those burdens, and that the court find those benefits to be compelling.

Respectfully Submitted,

By: 

Judith A. Rowland, Esq.
Crime Victims Legal Clinic
1221 22nd Street
San Diego, California 92102